No. 04-163

In the

Supreme Court of the United States

LINDA LINGLE, Governor of the State of Hawaii, and MARK J. BENNETT, Attorney General of the State of Hawaii,

Petitioners,

v.

CHEVRON USA, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION; GENE CASHMAN; ATHENA SUTSOS; WESTERN MANUFACTURED HOUSING COMMUNITIES ASSOCIATION; and DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF RESPONDENT CHEVRON USA, INC.

NANCIE G. MARZULLA
Of Counsel
Defenders of Property Rights
1350 Connecticut Avenue, N.W.
Suite 410
Washington, DC 20036
Telephone: (202) 822-6760
Facsimile: (202) 822-6774

R.S. RADFORD
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amici Curiae

QUESTIONS PRESENTED

1. Should this Court reverse 24 years of precedent and abandon what it has called its "general test" of liability for a regulatory taking: whether a land-use regulation substantially advances legitimate state interests?

2. Should this Court continue to afford meaningful protection to individual rights guaranteed under the Takings Clause of the Fifth Amendment, by applying mid-level scrutiny to land-use regulations challenged under the "substantial advancement" test, as mandated by *Nollan v. California Coastal Commission* and its progeny?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

IDENTITY AND INTEREST OF AMICI CURIAE 1

INTRODUCTION AND STATEMENT OF THE CASE 3

ARGUMENT 5

I. WHETHER A LAND-USE REGULATION SUBSTANTIALLY ADVANCES A LEGITIMATE STATE INTEREST HAS LONG BEEN—AND SHOULD REMAIN—THIS COURT'S "GENERAL TEST" FOR A REGULATORY TAKING 5

A. The Substantial Advancement Test Is a Settled, Long-Established, and Coherent Regulatory Takings Standard 5

B. The Pedigree of the Substantial Advancement Test Stretches Back Through *Penn Central* to *Pennsylvania Coal* ... 8

C. No Phantom "Majority" of the *Eastern Enterprises* (Or Any Other) Court Has Repudiated the Substantial Advancement Standard 11

II. REGULATORY TAKINGS CLAIMS BROUGHT UNDER THE SUBSTANTIAL ADVANCEMENT STANDARD MUST RECEIVE A HIGHER LEVEL OF JUDICIAL REVIEW THAN SUBSTANTIVE DUE PROCESS CLAIMS 15

TABLE OF CONTENTS—Continued

Page

III. THIS COURT'S SUBSTANTIAL ADVANCEMENT TAKINGS ANALYSIS IS ESSENTIAL TO EXPOSE AND REMEDY NAKED MAJORITARIAN RENT SEEKING, SUCH AS IS EVIDENCED IN MOBILE HOME PARK RENT CONTROL 20

IV. THE CORRECT APPLICATION OF THE SUBSTANTIAL ADVANCEMENT STANDARD IS A STRAIGHTFORWARD EXERCISE OF THE LEGITIMATE FUNCTION OF JUDICIAL REVIEW 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases

Agins v. City of Tiburon,
447 U.S. 255 (1980) 3-6, 10

Armstrong v. United States,
346 U.S. 40 (1960) 29

Bennett v. Spear, 520 U.S. 154 (1997) 3

Cashman v. City of Cotati,
374 F.3d 887 (9th Cir. 2004) 2, 25-26

Chevron U.S.A. Inc. v. Cayetano,
224 F.3d 1030 (9th Cir. 2000) 24

Chicago, B. & Q. R. Co. v. Chicago,
166 U.S. 226 (1897) 7

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 3-4, 13-14, 29

Dews v. Town of Sunnyvale,
109 F. Supp. 2d 526 (N.D. Tex. 2000) 19-20

Dolan v. City of Tigard,
512 U.S. 374 (1994) 3-4

Eastern Enterprises v. Apfel,
524 U.S. 498 (1998) 11-13

Euclid v. Ambler Realty Co.,
272 U.S. 365 (1926) 10

Hage v. United States,
35 Fed. Cl. 147 (1996) 29

Hall v. City of Santa Barbara,
833 F.2d 1270 (1986) 17, 22-23

TABLE OF AUTHORITIES—Continued

Page

Keene Corp. v. United States,
508 U.S. 200 (1993) 3

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) 4, 11

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 22

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 3-4,10, 17

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 28

Mayhew v. Town of Sunnyvale,
964 S.W. 2d 922 (Tex. 1998) 19

Moore v. City of East Cleveland,
431 U.S. 494 (1997) 7

Nectow v. City of Cambridge,
277 U.S. 183 (1928) 6-8

Nollan v. California Coastal Commission,
483 U.S. 825 (1987) 1, 4, 6-7, 10, 16

Palazzolo v. Rhode Island,
533 U.S. 606 (2001) 1, 3

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 8, 10

Pennell v. City of San Jose,
485 U.S. 1 (1988) 18, 19

Pennsylvania Coal Co. v. Mahon,
260 U.S. 393 (1922) 10

TABLE OF AUTHORITIES—Continued

Page

Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998) 3

Richardson v. City and County of Honolulu, 124 F.3d 1150 (9th Cir. 1997) 24

San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981) 27-28

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) 3

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997) 1, 3

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) 4, 14-17

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 4

Yee v. City of Escondido 503 U.S. 519 (1992) 4, 23-24

Statutes

Haw. Rev. Stat. § 486H-10.4 4

Miscellaneous

Bickel, Alexander M., *The Least Dangerous Branch*, 1-14 (2d ed. 1986) 28

Cordes, Mark W., *Legal Limits on Development Exactions: Responding to* Nollan *and* Dolan, 15 N. Ill. U. L. Rev. 513 (1995) 16

TABLE OF AUTHORITIES—Continued

Page

Dale-Johnson, David, Deng, Yongheng, Gordon, Peter & Zheng, Diehang, *An Examination of the Impact of Rent Control on Mobile Home Prices in California*, Working Paper No. 2004-1010, Lusk Center for Real Estate, University of Southern California (Nov. 1, 2004) 22

Dringman, Page Carroccia, Comment, *Regulatory Takings: The Search for a Definitive Standard*, 55 Mont. L. Rev. 245 (1994) 16

Echeverria, John D., *Does a Regulation That Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?*, 29 Envtl. L. 853 (1999) 8-9, 11

Epstein, Richard A., Yee v. City of Escondido: *The Supreme Court Strikes Out Again*, 26 Loy. L.A. L. Rev. 3 (1992) 21

Hirsch, Werner Z., *An Inquiry into Effects of Mobile Home Park Rent Control*, 24 J. Urb. Econ. 212 (1988) 21, 22

Hirsch, Werner Z., & Hirsch, Joel C., *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. Rev. 399 (1988) 21

Hirsch, Werner Z., & Rufolo, Anthony M., *The Regulation of Immobile Housing Assets Under Divided Ownership*, 19 Int'l Rev. L. & Econ. 383 (1999) 22

TABLE OF AUTHORITIES—Continued

Page

Kahn, Jordan C., *Lake Tahoe Clarity and Takings Jurisprudence: The Supreme Court Advances Land Use Planning in* Tahoe-Sierra, 26-Fall *Environs* 33 (2002) 9

Lazarus, Richard J., *Restoring What's Environmental About Environmental Law in the Supreme Court,* 47 UCLA L. Rev. 703 (2000) 14

Mandelker, Daniel R., & Payne, John M., *Planning and Control of Land Development: Cases and Materials* 119 (5th ed. 2001) 14

McUsic, Molly S., *Looking Inside Out: Institutional Analysis and the Problem of Takings,* 92 Nw. U. L. Rev. 591 (1998) 18

Quigley, John M., *Economic Analysis of Mobile Home Rent Control: The Example of San Rafael, California* (Sept. 12, 2002) 22

Radford, R.S., *Why Rent Control Is a Regulatory Taking*, 6 Fordham Envtl. L.J. 755 (1995) 9

Salzberg, Kenneth, *Rights with Responsibilities Land Use Law Symposium: "Takings" as Due Process, or Due Process as "Takings"?,* 36 Val. U. L. Rev. 413 (2002) 27

Skouras, George, *Takings Law and the Supreme Court: Judicial Oversight of the Regulatory State's Acquisition, Use and Control of Private Property* 117 (1998) 11

Sutton, Victoria, *Constitutional Taking Doctrine—Did* Lucas *Really Make a Difference*?, 18 Pace Envtl. L. Rev. 505 (2001) 9

TABLE OF AUTHORITIES—Continued

Page

Williams, Norman, et al., *The White River Junction Manifesto*, 9 Vt. L. Rev. 193 (1984) 28

IDENTITY AND INTEREST OF AMICI CURIAE[1]

Pacific Legal Foundation (PLF) is the largest and most experienced public interest legal foundation of its kind in the United States. Founded over 30 years ago, PLF is a nonprofit, tax-exempt corporation organized under the laws of California for the purpose of litigating matters affecting the public interest at all levels of state and federal courts. Representing the views of tens of thousands of members and supporters nationwide, PLF is an advocate of individual rights, including the fundamental right to own and make productive use of private property. PLF has appeared before this Court in many high-profile cases arising under the Takings Clause of the Fifth Amendment to the United States Constitution. PLF attorneys were counsel of record in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). PLF has also participated as amicus curiae in nearly every major real property takings case heard by this Court in the last two decades.

Gene Cashman and Athena Sutsos are owners of small mobile home parks in Cotati, California, which are subject to that city's mobile home rent control scheme. Regulations of this type enable park tenants (who dominate the political process in small towns like Cotati) to capture cash windfalls representing part of the value of the mobile home parks in which they reside. By enacting rent control and promptly selling their mobile homes in rent controlled parks, these

---

[1] All parties have consented to the filing of this brief under the terms of general consent letters, which have been filed by the parties with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, and no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

tenants acquire part of the value of the park owners' property, with no benefit accruing to the community as a whole. Cashman and Sutsos successfully challenged this scheme as a regulatory taking in *Cashman v. City of Cotati*, 374 F.3d 887 (9th Cir. 2004), a decision that relies on a straightforward application of the substantial advancement takings test from *Agins v. City of Tiburon*. Cotati's petition for rehearing or rehearing en banc is currently pending before the Ninth Circuit, where it awaits this Court's disposition of the present case.

Western Manufactured Housing Communities Association represents 1,700 mobile home park operators. It is the largest such organization in the United States. The Association has a vital interest in the issues raised by this case because its members face those same issues continuously—particularly in California, where mobile home rent control ordinances are ubiquitous and the state courts are inhospitable to the claims of park owners to a fair return on their investments. In most cases, these owners' only meaningful avenue of relief from confiscatory rent regulations is to pursue regulatory takings claims in federal court, relying on the "substantial advancement" prong of *Agins v. City of Tiburon*. If this Court rejects or significantly restricts the applicability of the substantial advancement standard, the Association's members will have no effective judicial remedy for the systematic confiscation of the value of their property via mobile home park rent control.

Defenders of Property Rights (Defenders) is the only national legal defense foundation dedicated exclusively to protecting private property rights. Based in Washington, D.C., Defenders was founded as a nonprofit, public interest legal foundation in 1991. Its mission is to protect vigorously those rights considered essential by the framers of the Constitution, and to promote a better understanding of the relationship between private property rights and individual liberty. Defenders engages in litigation across the country on behalf of

its thousands of members and the public interest to prevent government incursion into protections guaranteed by the Bill of Rights. Since its inception, Defenders has participated in every major property rights case before this Court, including *Palazzolo v. Rhode Island*, 533 U.S. 606; *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725; *Bennett v. Spear*, 520 U.S. 154 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Keene Corp. v. United States*, 508 U.S. 200 (1993); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

Counsel for amici are familiar with the issues in this case and have reviewed the Brief for Petitioners (Pet. Brf.) and the amicus brief filed in this matter by the Solicitor General. Amici believe these briefs incorporate fundamental doctrinal errors based upon misinterpretations of this Court's regulatory takings jurisprudence. Amici further believe that their experience with regulatory regimes such as the rent control statute at issue in this case, together with their litigation experience in the issues involved, their special expertise in regulatory takings law, and their public interest perspective will assist this Court in resolving the important issues presented by this case.

INTRODUCTION AND STATEMENT OF THE CASE

Twenty-four years ago, in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), a case involving a facial challenge to a residential zoning ordinance, this Court explained the criteria for finding such measures unconstitutional under the Takings Clause of the Fifth Amendment:

> The application of a general zoning law to particular property effects a taking if the ordinance does not

> substantially advance legitimate state interests . . . or denies an owner economically viable use of his land.

Id. at 260. Since 1980, this Court has frequently reiterated and applied the "substantial advancement" prong of *Agins* as a test for regulatory takings in cases involving a wide variety of both facial and as-applied challenges to legislative enactments and regulatory actions. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 334 (2002); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,526 U.S. 687 at 704, *Dolan v. City of Tigard*, 512 U.S. 374 at 385; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 at 1016; *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Nollan v. California Coastal Commission,* 483 U.S. 825 at 834; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985). This standard is so thoroughly ingrained in this Court's protection of individual rights guaranteed under the Fifth Amendment it has been described as the Court's "general test" for a regulatory taking. *City of Monterey*, 526 U.S. at 704.

The present case involves the application of the substantial advancement test by the Ninth Circuit Court of Appeals to strike down a state law that controls the rent oil companies may charge to the lessees of their service stations. The ostensible purpose of the statute, Haw. Rev. Stat. § 486H-10.4, is to hold down the price of gasoline to consumers. Plaintiff-Appellee Chevron U.S.A., Inc. (Chevron), sued to have the law declared unconstitutional as an uncompensated taking of its property in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

Chevron initially prevailed on a motion for summary judgment, the trial court finding that the rent control scheme failed to substantially advance legitimate state interests as a matter of law, and therefore violated the Takings Clause. On

remand by the Ninth Circuit, a trial was held which again resulted in a judgment that the rent control law effected a regulatory taking under the substantial advancement standard. The trial court found, *inter alia*, that controlling Chevron's station rents will not, as a factual matter, advance the law's objective of reducing gasoline prices. Instead, the operative effect of the law is merely to create a premium in the value of rent-controlled service stations, that Chevron's lessees can capture by selling their leases.

On certiorari to this Court, the State and its amici argue that the trial court's inquiry into whether Haw. Rev. Stat. § 486H-10.4 substantially advances legitimate state interests—which has long been recognized as the appropriate standard for regulatory takings claims of this sort—should in fact be regarded as a substantive due process inquiry. Similarly, rejecting 17 years of Supreme Court precedent, the State and its amici urge this Court to return to the deferential review of constitutionally suspect regulations that prevailed prior to *Nollan.*

ARGUMENT

I

WHETHER A LAND-USE REGULATION SUBSTANTIALLY ADVANCES A LEGITIMATE STATE INTEREST HAS LONG BEEN—AND SHOULD REMAIN—THIS COURT'S "GENERAL TEST" FOR A REGULATORY TAKING

A. The Substantial Advancement Test Is a Settled, Long-Established, and Coherent Regulatory Takings Standard

The State of Hawaii and its amicus, the Solicitor General, have assumed the burden of persuading this Court to jettison 24 years of precedent and repudiate the first prong of *Agins v. City*

of Tiburon, which holds that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests." 447 U.S. at 260. Such a sharp break with this Court's historical jurisprudence would deal a crushing blow to constitutional protections of the rights of property owners. Moreover, the arguments that are advanced in support of this radical revisionism are not supported by careful analysis.

The core insight advanced by the State and the Solicitor General amounts to nothing more than the self-evident proposition that, in setting forth the first prong of its takings test, the *Agins* Court cited to *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), a challenge to a zoning ordinance brought under the Fourteenth Amendment's Due Process Clause. The State's implicit reasoning is that, because the language of "substantial advancement" was previously used in a due process case, when that terminology is subsequently cited in a regulatory takings decision, the cited language must remain a due process standard.

The difficulties with this position are manifold. Perhaps most crucially, it assumes a doctrinal fastidiousness that never exists in the real world of constitutional adjudication. Standards and criteria developed in cases brought under one Constitutional provision are commonly brought to bear on issues implicating completely different clauses or even Amendments, without prompting analysts to protest that these tests must remain permanently and solely wed to the applications in which the Court first found them useful. The use of evaluative standards that seem similar or even identical does not imply that the Court has confused the Free Exercise Clause with the Equal Protection Clause, or that it has chosen to use the same test for both clauses by mistake. *See, e.g., Nollan*, 483 U.S. at 834 n.3:

> There is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue, the standards for takings challenges, due process challenges, and equal protection challenges are identical, any more than there is any reason to believe that so long as the regulation of speech is at issue, the standards for due process challenges, equal protection challenges, and First Amendment challenges are identical.

The migration of standards between the Takings and Due Process Clauses is especially unremarkable, given the close historical relationship between the two provisions. On its own terms, the Takings Clause—like the rest of the Bill of Rights—applies only against the federal government. It was not until the Fifth Amendment was deemed incorporated into the Fourteenth Amendment's Due Process Clause in 1897 that it became possible to plead a cause of action against a state or local governmental entity under the Takings Clause. *See Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

In the first decades following this development, the fact that nearly every takings claim also entailed a due process violation led to a substantial conflation of terminology. As Justice Stevens has explained, the Court in the early years of the 20th century had "fused the two express constitutional restrictions on any state interference with private property that property shall not be taken without due process nor for a public purpose without just compensation, into a single standard," *Moore v. City of East Cleveland*, 431 U.S. 494, 514 (1997) (Stevens, J., concurring), and "this principle was applied in *Nectow*." *Id.*

Thus, far from being surprised that *Nectow* was cited in *Agins*, we should be surprised if it were not cited in other regulatory takings cases—and, in fact, it has been. Even the

recently proclaimed "polestar" of the Court's regulatory takings jurisprudence, *Penn Central*, cites *Nectow* as authority. *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 127 (1978) (citing *Nectow*, 227 U.S. at 188). Of course, the same objections can be (and have been) raised to *Nectow*'s appearance in *Penn Central* as to its citation in *Agins*, but the argument becomes more strained as the underlying enterprise takes on more clarity. *See* John D. Echeverria, *Does a Regulation That Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?*, 29 Envtl. L. 853, 857-58 (1999):

> In *Penn Central*, the Court relied upon due process, not takings, precedents .... *Nectow* patently was not a takings case, but instead involved a due process claim that the ordinance 'deprived [the owner] of his property without due process of law in contravention of the Fourteenth Amendment.'

It is one thing to cling to a formalistic insistence that each constitutional provision should have its own neatly compartmentalized set of doctrines, but it is something else again to insist that violating these largely imaginary doctrinal boundaries is grounds for jettisoning this Court's entire corpus of regulatory takings law—which is, in fact, precisely the enterprise the State and the Solicitor General have undertaken.

B. The Pedigree of the Substantial Advancement Test Stretches Back Through *Penn Central* to *Pennsylvania Coal*

In any event, it isn't necessary to go back to *Nectow* to trace the lineage of *Agins*' two-pronged takings test, since its immediate progenitor is much closer at hand. It has long been recognized that the takings standards set out in *Agins* differ only in terminology from *Penn Central*'s focus on "the character of the governmental action" and "[t]he economic impact of the regulation on the claimant." 438 U.S. at 124. Conceptually, the

Agins and *Penn Central* standards are equivalent. *See* John D. Echeverria, *Does a Regulation That Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?*, 29 Envtl. L. at 855:

> More than twenty years ago, in *Penn Central Transportation Co. v. New York City* (*Penn Central*), the Court stated that "a use restriction may constitute a 'taking' if [it is] not reasonably necessary to the effectuation of a substantial government purpose." Two years later, in *Agins v. City of Tiburon*, the Court said essentially the same thing: a government action "effects a taking" if it "does not substantially advance legitimate state interests."

See also Jordan C. Kahn, *Lake Tahoe Clarity and Takings Jurisprudence: The Supreme Court Advances Land Use Planning in* Tahoe-Sierra, 26-Fall *Environs* 33, 57 n.160 (2002) ("the 'character of government action' factor in the *Penn Central* analysis . . . includes a consideration of whether the regulation at issue does or 'does not substantially advance legitimate state interests' "); Victoria Sutton, *Constitutional Taking Doctrine—Did* Lucas *Really Make a Difference*?, 18 Pace Envtl. L. Rev. 505, 509 (2001) (characterizing *Penn Central*'s "character of the government action" test as "the progenitor of the 'substantially advances legitimate state interests' test articulated two years later in *Agins*"); R. S. Radford, *Why Rent Control Is a Regulatory Taking*, 6 Fordham Envtl. L.J. 755, 757 (1995) ("In *Agins*, the two-part *Penn Central* inquiry was recast in terms of whether the challenged measure: (1) substantially advances legitimate state interests; or (2) denies the owner economically viable use of the land.").

Justice Brennan advanced the clearest statement of the equivalence (indeed, the virtual identity) of the standards set out by the two cases in his *Nollan* dissent:

> Our phraseology may differ slightly from case to case—*e.g.*, regulation must "substantially advance," *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), or be "reasonably necessary to," *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127, (1978), the government's end. *These minor differences cannot, however, obscure the fact that the inquiry in each case is the same.*

Nollan, 483 U.S. at 845 (Brennan, J. dissenting) (emphasis added). More recently, Justice Scalia's majority opinion in *Lucas* provided a further refutation of the view that *Agins*' first prong marked a departure from the Court's established takings jurisprudence:

> "Harmful or noxious use" analysis was, in other words, simply the progenitor of our more contemporary statements that "land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' ". . . . *Nollan, supra*, 483 U.S. at 834 (quoting *Agins v. Tiburon*, 447 U.S. at 260); *see also Penn Central Transportation Co., supra*, 438 U.S. at 127; *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-388, (1926).

Lucas, 505 U.S. at 1023-24.

In fact, as this Court has noted, Agins' two-pronged takings inquiry can be traced back not just to *Penn Central*, but to the very font of its modern takings jurisprudence, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922):

> Justice Holmes rested on two propositions, both critical to the Court's decision. First, because it served only private interests, not health or safety, the Kohler Act could not be "sustained as an exercise of the police power." Second, the statute made it "commercially impracticable" to mine "certain coal" in the areas affected by the Kohler Act.

Keystone, 480 U.S. at 484. *See also* George Skouras, *Takings Law and the Supreme Court: Judicial Oversight of the Regulatory State's Acquisition, Use and Control of Private Property* 117 (1998) ("Justice Holmes, working through balancing tests, established a set of criteria that continue unabated until this day. . . . The criteria in *Pennsylvania Coal* were refined in *Penn Central*.").

The doctrinal equivalence of *Penn Central* and *Agins* is acknowledged by the more perceptive critics of the substantial advancement standard, but this only serves to shift their objections back a step—to *Penn Central* itself, or in extreme cases, all the way back to *Pennsylvania Coal*. *See, e.g.*, John D. Echeverria, *Does a Regulation That Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?*, at 857-58. With this shift, however, the very consistency of their argument undermines its credibility. If *Agins*' first prong were, as is sometimes claimed, an isolated anomaly, it is arguably not too far-fetched to suppose that the substantial advancement standard might be dismissed as some sort of doctrinal slip of the pen. But when we realize we are dealing with a standard that has been deeply ingrained into the entire corpus of regulatory takings law from the beginning, nothing less than the modern Court's protection of the constitutionally-guaranteed rights of property owners hangs in the balance.

C. No Phantom "Majority" of the *Eastern Enterprises* (Or Any Other) Court Has Repudiated the Substantial Advancement Standard

In the face of this Court's long-established use of the substantial advancement test to resolve regulatory takings claims, the State invokes a phantom "majority" that supposedly backed away from this standard in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). *See* Pet. Brf. at 30-32. This remarkable

claim, which is recycled from the State's unsuccessful brief to the Ninth Circuit, is simply ungrounded in reality.

In *Eastern*, Justice O'Connor's plurality opinion found a statute's creation of retroactive financial liability to be unconstitutional under the Takings Clause. The plurality did not cite to *Agins*, nor did it decide the case under the substantial advancement standard. Instead, Justice O'Connor applied a straightforward *Penn Central* analysis, finding that the character of the regulation was such that it "singles out certain employers" based on long-past activities, thereby "implicat[ing] fundamental principles of fairness underlying the Takings Clause." *Id* at 537.

Concurring in the result, Justice Kennedy agreed that the statute was unconstitutional as applied to Eastern, but he would strike it down "as contrary to essential due process principles, without regard to the Takings Clause of the Fifth Amendment." *Id.* at 539 (Kennedy, J., concurring in the judgment and dissenting in part). The crux of Justice Kennedy's concern was that the Act did not directly impinge upon any identifiable property interest. Without a direct link between the impact of the law and "a specific property right or interest" protected by the Fifth Amendment, *id.* at 541, Justice Kennedy felt the Takings Clause was not implicated. In this context, he worried that

> [t]he imprecision of our regulatory takings doctrine does open the door to normative considerations about the wisdom of government decisions. See, *e.g., Agins v. City of Tiburon*, 447 U.S. at 260 (zoning constitutes a taking if it does not "substantially advance legitimate state interests").

Id. at 545. But of course, *Agins* ***did*** involve governmental interference with a traditional, constitutionally cognizable property interest, and therefore presumably escaped Justice

Kennedy's concern about the applicability of the Takings Clause.

Writing for a four-Justice dissent, Justice Breyer agreed that "[t]he Constitution's Takings Clause does not apply." *Id.* at 554 (Breyer, J., dissenting). Like Justice Kennedy, the dissent was troubled by the plurality's application of the Takings Clause to a case that

> involves not an interest in physical or intellectual property, but an ordinary liability to pay money, and not to the Government, but to third parties.

Id. Like the plurality, however, the dissent did not address the substantial advancement standard.

In view of these facts, the State's present effort to concoct a five-Justice "majority" out of a concurrence and a dissent—including four Justices who did not so much as mention the substantial advancement issue—seems puckish at best. That Justice Kennedy's concurrence in *Eastern Enterprises* cannot be construed as a general rejection of the substantial advancement takings standard is evident from the opinion of the Court he drafted just eleven months later in *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687. In *City of Monterey*, a property owner brought a regulatory takings suit based on a city's repeated, unreasonable denials of development permits. *See id.* at 695-98. The case went to a jury on a strange amalgam of *Agins* and *Lucas*: the trial court instructed the panel that takings liability should be found either if the permit denials deprived the owner of ***all*** economically viable use of the property, or if the city's actions did not "substantially advance a legitimate public purpose." *See id.* at 700. As a practical matter, only the latter criterion provided a realistic basis for takings liability, since the plaintiffs had sold the regulated property for $4.5 million. The jury returned a general verdict of liability, *see id.* at 701, in effect finding a compensable taking because the City's successive denials of the plaintiff's

permit applications failed to substantially advance legitimate governmental interests. *See, e.g.*, Daniel R. Mandelker & John M. Payne, *Planning and Control of Land Development: Cases and Materials* 119 (5th ed. 2001) (the *City of Monterey* trial court "essentially put the case to the jury on the first prong of *Agins*, and because it was a general verdict, it had to be presumed that the jury had decided on this theory").

In affirming the finding of a taking, Justice Kennedy's opinion for the Court repeatedly expressed its satisfaction with the jury instructions, and with the substantial advancement inquiry serving as the basis for takings liability. *See City of Monterey*, 526 U.S. at 702-07. The Supreme Court's answer to the City of Monterey's question was clear: "the trial court's instructions are consistent with our previous general discussions of regulatory takings liability." 526 U.S. at 704. In other words, *Eastern Enterprises* notwithstanding, Justice Kennedy's opinion in *City of Monterey* expressly reiterated this Court's traditional understanding that takings liability may properly be grounded on the failure of land-use regulations to substantially advance legitimate state interests, going so far as to characterize this as ***"the general test for regulatory takings liability."*** *Id.* (emphasis added).

With the exception of the State's counsel, virtually all commentators have acknowledged that *City of Monterey* reaffirms the substantial advancement test as a central element of the Supreme Court's regulatory takings jurisprudence. *See, e.g.*, Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. Rev. 703, 720 n.89 (2000) ("[t]he ruling in favor of the property owner in *City of Monterey* is especially significant because it represents the first occasion that the Court has ever upheld a regulatory takings claim based just on the so-called first prong of the regulatory takings test announced in *Agins v. City of Tiburon*). This understanding was underscored in the Court's most recent regulatory takings decision, *Tahoe-Sierra*

Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, in which the Court enumerated seven alternative theories under which a development moratorium could give rise to a regulatory taking, including:

> Sixth, apart from the District Court's finding that TRPA's actions represented a proportional response to a serious risk of harm to the lake, ***petitioners might have argued that the moratoria did not substantially advance a legitimate state interest, see Agins and Monterey.***

Id. at 334 (emphasis added).

In short, in the half-decade since the Court's fragmented decision in *Eastern Enterprises,* every Justice has written or joined opinions applying, upholding, or expressly reaffirming the general applicability of the substantial advancement test to regulatory takings. Thus, as of its last major land-use takings decision, the Court is unanimous in its understanding that a land-use regulation that fails to substantially advance legitimate state interests ***does*** result in a regulatory taking.

II

REGULATORY TAKINGS CLAIMS BROUGHT UNDER THE SUBSTANTIAL ADVANCEMENT STANDARD MUST RECEIVE A HIGHER LEVEL OF JUDICIAL REVIEW THAN SUBSTANTIVE DUE PROCESS CLAIMS

As a corollary to their efforts to relegate the substantial advancement takings test to a toothless variety of due process review, the State and its amici also seek to undermine the level of scrutiny required by this Court in regulatory takings cases. *See* Pet. Brf. at 37-50. At issue is *Nollan*'s footnote 3, which has been under continuous attack by virtually every level of the

regulatory bureaucracy since the day it was enunciated, over 17 years ago:

> [O]ur opinions do not establish that [takings] standards are the same as those applied to due process or equal protection claims. To the contrary, . . . [w]e have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State '*could rationally have decided*' that the measure adopted might achieve the State's objective."

Nollan, 483 U.S. at 834 n.3 (citations omitted).

Obviously, substantial advancement takings claims cannot *both* be subjected to deferential review *and* be expressly distinguished from the level of scrutiny applied in due process or equal protection claims. The theoretical significance of this Court's requirement of heightened scrutiny has been clear to commentators from the outset. *See, e.g.*, Mark W. Cordes, *Legal Limits on Development Exactions: Responding to* Nollan *and* Dolan, 15 N. Ill. U. L. Rev. 513, 534 (1995) (noting that the *Dolan* "Court's analysis demonstrated a seriousness of review to protect [against] unjustified intrusions on property interests"); Page Carroccia Dringman, Comment, *Regulatory Takings: The Search for a Definitive Standard*, 55 Mont. L. Rev. 245, 253 (1994) ("*Nollan v. California Coastal Commission* signaled the United States Supreme Court's movement away from a 'rubber stamp' or superficial application of the rational basis test to a more rigorous standard of review").

This Court's application of heightened scrutiny under *Agins*' first prong is not an aberration, nor is it an arbitrary or mistaken appendage to takings law. Rather, the requirement of an elevated standard of review is implied by the very existence of a cause of action for regulatory takings. As the *Tahoe-Sierra* Court noted, regulatory takings differ in nature from physical

occupations or invasions, either directly by the government or by third parties acting under governmental authority. *See* 535 U.S. at 322-23. It is this very difference that gives rise to the need for heightened scrutiny of regulatory takings claims. Physical invasions or occupations of private property by the state are normally obvious to a fact finder employing even a minimal standard of review. The only question in such cases is whether just compensation has been paid—again, an inquiry that can be conducted on the level of an evidentiary hearing, without need for probing review on the part of the court. The situation is completely different when the government, inadvertently or by design, accomplishes the same effect as if it had taken title to private property, but without acknowledging either the usurpation or the requirement to compensate. As the Ninth Circuit Court of Appeals has observed:

> It makes considerable sense to give greater deference to the legislature where it deliberately resorts to its eminent domain power than where it may have stumbled into exercising it through actions that incidentally result in a taking.

Hall v. City of Santa Barbara, 833 F.2d 1270, 1280 n.25 (1986). In the successive two-part inquiries set out in *Pennsylvania Coal*, *Penn Central*, and *Agins*, this Court has recognized the necessity of examining the nature and impact of challenged regulations to determine whether they are the functional equivalent of seizures, pressing private property "into some form of public service under the guise of mitigating serious public harm," but without payment of compensation. *Lucas*, 505 U.S. at 1018. Such an inquiry, by definition, requires going behind the surface of the regulatory rationale—i.e., it requires an elevated level of scrutiny.

But the heightened scrutiny requirement implicit in *Agins*' first prong does not flow automatically from the mere invocation of the standard; applying meaningful review of state

action requires an act of judicial will. This responsibility can easily be evaded. The most common way to convert the substantial advancement standard into deferential review is to characterize it as merely requiring a rational relationship between regulatory ends and means—since requiring means-ends consistency is just another way of describing rational basis review.

In *Nollan*, this Court did inquire into the relationship between regulatory ends and means. Far more important, however, was *Nollan*'s emphasis on the need for a close *causal* nexus between the burdens imposed by the regulations, and the social costs that would otherwise be imposed by the property's unregulated use. As Professor McUsic points out,

> [The *Nollan*] Court described the "substantially advance" test as one that examines the proportionate relationship between the amount of public harm caused by the owner and the regulatory burden imposed: a cause-effect test. . . .
>
> The second meaning of the substantially advance requirement—the cause-effect test—focuses on whether the burden of a regulation is properly placed on a particular owner.

Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 Nw. U. L. Rev. 591, 602 (1998). It is the requirement of a *cause-effect* nexus, not just an ends-means fit, that offers real protection against the imposition of unjustified or disproportionate burdens on individual property owners. This fact was emphasized by Justice Scalia in his separate opinion in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), in which he explained:

> Traditional land-use regulation (short of that which totally destroys the economic value of property) does not violate this [substantial advancement] principle

> because there is ***a cause-and-effect relationship*** between the property use restricted by the regulation and the social evil that the regulation seeks to remedy.

Id. at 20 (Scalia, J., concurring in part and dissenting in part).

The crucial importance of applying heightened scrutiny in conjunction with the substantial advancement test has never been more dramatically illustrated than by a pair of cases springing from a common factual setting: *Mayhew v. Town of Sunnyvale*, 964 S.W. 2d 922 (Tex. 1998), and *Dews v. Town of Sunnyvale*, 109 F. Supp. 2d 526 (N.D. Tex. 2000). In *Mayhew*, a proposed residential development was prohibited after years of negotiations on the grounds that it would be inconsistent with the town's minimum lot size requirements. The property owners sued, alleging that the town's actions failed to substantially advance legitimate state interests. A trial court agreed, finding that the town's denial of the Mayhews' project "does not bear any factual relationship to valid planning principles or objectives." 964 S.W.2d at 927. The state supreme court reversed, applying a deferential level of scrutiny to conclude that the permit denial advanced Sunnyvale's legitimate interest in maintaining "the overall character of the community and the unique character and lifestyle of the Town." *Id.* at 935.

Following a second permit denial, the Mayhews' successors in interest sued in federal district court on equal protection grounds. In contrast to the Texas Supreme Court, the federal judge applied a heightened standard of review and found the town's building restrictions were racially motivated—designed primarily to prevent minorities from moving into the community. *Dews*, 109 F. Supp. 2d at 568-71. In other words, by probing beneath the town's superficial rationale, the federal court was able to determine that what local officials meant by preserving the "unique character and lifestyle" of the town, was keeping it White. The official rationalizations, unquestioningly

accepted under the state court's deferential review, were found to have comprised merely "a facade in an unsuccessful attempt to shield [the Town] from liability for excluding both African-Americans and affordable housing from Sunnyvale." *Id.* at 572.

This sobering example should not be taken to mean that governmental bad faith is the sole rationale for a meaningful standard of review in takings cases. The nature and effect of restrictive land-use regulations must be subjected to more than bare rationality review if courts are to determine whether *any* such measure effectively takes private property for public use, no matter how well-intentioned it may be. Nevertheless, as was clear to the Founders and has been demonstrated repeatedly throughout our Nation's history, good faith on the part of the regulatory bureaucracy can never be presumed. Abandoning heightened scrutiny for the deferential review urged on this Court by the State and the Solicitor General would be tantamount to shifting every property owner in the United States from the position of the plaintiffs in *Dews*, to those in *Mayhew*.

III

THIS COURT'S SUBSTANTIAL ADVANCEMENT TAKINGS ANALYSIS IS ESSENTIAL TO EXPOSE AND REMEDY NAKED MAJORITARIAN RENT SEEKING, SUCH AS IS EVIDENCED IN MOBILE HOME PARK RENT CONTROL

Mobile home park rent control offers a paradigm example of the capture of local legislative processes by rent-seeking majorities, whose eagerness to transfer the assets of property-owning minorities to themselves cannot be checked except by vigorous judicial review. This type of regulation embodies an especially malevolent breakdown in the political process, because once tenant-lobbyist-legislators succeed in imposing controls, they can immediately "cash out," capturing the full

present value of below-market rents by selling their mobile home coaches in place in rent-controlled parks. *See, e.g.*, Richard A. Epstein, Yee v. City of Escondido: *The Supreme Court Strikes Out Again*, 26 Loy. L.A. L. Rev. 3, 10 (1992) (Mobile home park rent control "increases the returns to local renters from the passage of the rent control statute by allowing them to capture the full stream of future periodic expropriations from the landlord.").

The mechanism that facilitates this is both obvious and simple enough to have been employed by hundreds of tenant-dominated localities in California. Mobile home park tenants normally own their own coaches, which sit on "pads" owned by the mobile home park. Their housing costs are therefore the sum of mortgage payments on the coach, plus rent payments on the underlying land. Rent control obviously reduces the second component, but in addition, the assurance of below-market rents in the future is capitalized into the resale value of the coach. This "premium," or incremental resale value attributable to rent control, represents the present value of the future stream of financial benefits tenants will receive from the regulations, discounted at an appropriate rate. It is an amount equal to the decrease in value of the underlying land because of rent control, and therefore is the equivalent of a direct cash transfer from park owner to tenant, effected via the legislative process. *See, e.g.*, Werner Z. Hirsch & Joel C. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. Rev. 399, 423-24 (1988).

The capitalization into coach prices of the monetary value of mobile home park rent control has been well documented empirically. As long ago as 1988, research by the internationally reputed economist, Dr. Werner Hirsch, showed that California mobile home park tenants used rent control to transfer to themselves a part of the value of mobile home parks equal to 32% of the resale value of their coaches. *See* Werner

Z. Hirsch, *An Inquiry into Effects of Mobile Home Park Rent Control*, 24 J. Urb. Econ. 212, 223-24 (1988). A second study published more than a decade later confirmed that these regulations were still being successfully used by tenant majorities to transfer to themselves the cash value of mobile home park assets. *See* Werner Z. Hirsch & Anthony M. Rufolo, *The Regulation of Immobile Housing Assets Under Divided Ownership*, 19 Int'l Rev. L. & Econ. 383, 396 (1999). Again in 2002, an empirical study by a University of California economist showed that in one upscale California community, tenant-legislators were able to pocket almost $61,000 per coach in confiscated asset value as a direct result of enacting mobile home park rent control. *See* John M. Quigley, *Economic Analysis of Mobile Home Rent Control: The Example of San Rafael, California* (Sept. 12, 2002). The most recent scholarly research on this topic was conducted by economists at the prestigious Lusk Center for Real Estate at the University of Southern California. Like Hirsch, Hirsch & Rufolo, and Quigley, these researchers confirmed that mobile home park rent control is a powerful and effective mechanism for confiscating the value of park land and transferring it to tenants who then convert it to cash. *See* David Dale-Johnson, Yongheng Deng, Peter Gordon & Diehang Zheng, *An Examination of the Impact of Rent Control on Mobile Home Prices in California*, Working Paper No. 2004-1010, Lusk Center for Real Estate, University of Southern California (Nov. 1, 2004).

This confiscation by tenants of the value of park owners' land was initially challenged as a taking under the "permanent physical occupation" theory of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The Ninth Circuit agreed with this analysis, striking down a mobile home rent control scheme in *Hall v. City of Santa Barbara*, 833 F.2d 1270. Significantly, the court of appeals went beyond the physical taking issue presented by the plaintiffs, to consider

whether Santa Barbara's ordinance could be said to substantially advance legitimate state interests—and found that it could not. *See id.* at 1280. Because new tenants would receive no financial benefit from rent control, having paid its full cash value to the previous coach owners, the *Hall* court found that the law "may well hinder" its objective of alleviating a "critical shortage of low and moderate income housing." *Id.* at 1280-81.

The successful *Hall* litigation triggered a number of lawsuits challenging the constitutionality of mobile home rent control in California. In 1992, one such action, *Yee v. City of Escondido*, 503 U.S. 519, was accepted for review by this Court. Justice O'Connor's majority opinion focused on the legal-theoretical shortcomings of applying the *Loretto* physical takings model to rent control. The Court recognized and addressed the effect of Escondido's ordinance in enabling tenant-legislators to capture the monetary value of the regulations in the resale price of their coaches. *See id.* at 530. Yet, while acknowledging that such an explicit majoritarian wealth transfer might fall "within the scope of our regulatory taking cases," *id.* at 527, the Court rejected the park owners' argument that the tenants' capture of the value of occupying the plaintiffs' property effected a physical taking. Perhaps most significantly, Justice O'Connor went on to add:

> This effect might have some bearing on whether the ordinance causes a ***regulatory*** taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance.

Id. at 530 (citing *Nollan*, 483 U.S. at 834-35). This is, of course, a reference to the substantial advancement takings standard, already cited by the Ninth Circuit as an alternative basis for takings liability in *Hall*. Yet despite the urging of Judge Bork's brief for the petitioners and an amicus brief filed

in their support by Pacific Legal Foundation, the Court declined to consider the merits of a regulatory takings claim in *Yee*, on the technical grounds that this question had not been presented in the Yees' petition for certiorari. *See id.* at 533.

The first response to *Yee*'s seeming invitation came in *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997). Typically, there is divided ownership of condominiums on Oahu and the underlying land. The ordinance at issue in *Richardson* limited land-rent increases and specifically provided that the below-market rents were transferable, thereby facilitating capture and capitalization of the financial benefits of rent control by condominium residents. As in the analogous case of mobile home parks, the Ninth Circuit recognized that "[i]ncumbent owner occupants who sell to those who intend to occupy the apartment will charge a premium for the benefit of living in a rent controlled condominium." *Id.* at 1166. Drawing on *Yee*, the court of appeals went on to note that this feature of the ordinance prevented it from substantially advancing legitimate governmental interests:

> The conveyance provision, as explained above [facilitating the capitalization and capture of the monetary benefits of rent control], vitiates the cause-and-effect relationship between the property use restricted (rent rates) and the social evil the Ordinance seeks to remedy (lack of affordable housing).

Id. at 1165.

A similar analysis was subsequently applied in *Chevron U.S.A. Inc. v. Cayetano*, 224 F.3d 1030 (9th Cir. 2000), the immediate forerunner of the present case before the Court. However, the Ninth Circuit found that summary judgment had been improperly granted because of the existence of conflicting expert testimony on whether the premium created by the regulations could be capitalized and captured by the dealers, or

whether Chevron could offset this effect by adjusting the wholesale price of its gasoline. At this point the factual dispute in *Chevron* diverges from the mobile home park paradigm, since in the latter case there is no possibility of a secondary, offsetting revenue flow between owners and tenants.

Meanwhile, independently of the *Chevron* litigation, a *Richardson*-based regulatory takings challenge to a mobile home park rent control scheme came before the Ninth Circuit. In 1998, the voters of the City of Cotati terminated years of litigation by repealing that city's general rent control ordinance. But no sooner had the electorate voted to remove rent control from the books, than the city council adopted a new measure that applied rent control exclusively to mobile home parks. The city's three park owners, including the present amici Gene Cashman and Athena Sutsos, filed suit under a *Richardson*-style substantial advancement takings theory. This case, *Cashman v. City of Cotati*, 374 F.3d 887, reached the Ninth Circuit in 2004.

In a decision that closely tracks the legal analysis of *Richardson*, the *Cashman* panel reversed a trial court's ruling that Cotati's new rent ordinance passed constitutional muster, and held that an earlier order granting summary judgment to the park owners should be reinstated. The panel noted the case's factual similarity to *Richardson*, which was also decided on summary judgment:

> Like in *Richardson*, there is no dispute that Ordinance No. 680 does not on its face prevent mobilehome tenants from capturing a premium. There is separate ownership of the mobilehome coaches and the underlying land, controlled rent, and the ability of incumbent tenants to sell their mobilehomes subject to this controlled rent. This creates the possibility of

> a premium, which undermines the City's interest in creating or maintaining affordable housing.

Cashman v. City of Cotati, 374 F.3d 887, 899 (2004).

Moreover, the *Cashman* court pointed to the absence of extraneous variables such as were present in *Chevron*, that could potentially prevent Cotati's tenants from capitalizing and capturing the rent control premium.

On August 3, 2004, the City of Cotati filed a petition with the Ninth Circuit seeking rehearing or rehearing en banc, once again urging rejection of the substantial advancement standard and heightened scrutiny of regulatory takings claims. This petition remains pending, presumably awaiting this Court's determination of the present case.

It is essential that this Court maintain the vitality of the substantial advancement test if there is to be any justice for victims of majoritarian rent-seeking such as Gene Cashman and Athena Sutsos. Under a deferential due process standard, the constitutional rights of Cashman, Sutsos, and hundreds of other mobile home park owners in California will be worth no more than those of the plaintiffs in *Mayhew*.

IV

THE CORRECT APPLICATION OF THE SUBSTANTIAL ADVANCEMENT STANDARD IS A STRAIGHTFORWARD EXERCISE OF THE LEGITIMATE FUNCTION OF JUDICIAL REVIEW

The radical position advanced by the State and the Solicitor General in this case comprises a protest against this Court's fundamental approach to regulatory takings analysis—and indeed, against the very concept of regulatory takings. The argument to relegate *Agins*' first prong to a due process inquiry may seem more plausible, because it appears to be more

limited, than calls for overruling *Penn Central* and *Pennsylvania Coal*, or for the outright elimination of regulatory takings as a viable constitutional claim. Nevertheless, since the substantial advancement test or its conceptual equivalent has been an essential element of this Court's takings jurisprudence since its inception, appeals to eliminate this standard fit easily within the broader assault on regulatory takings per se. The underlying theme is that courts should not apply the Takings Clause in any situation not involving outright physical appropriations:

> What is wrong with a simple reading of the Takings Clause that would apply it to occasions when the government actually physically takes and uses the land in question? What limitations could there then be on the government's overreaching by regulation? What should a court do when the government goes too far? If "goes too far" means the same thing as interfering with due process rights in property, then the more consistent, predictable, and traditional result would be to strike down the regulation as an unconstitutional denial of due process.

Kenneth Salzberg, *Rights with Responsibilities Land Use Law Symposium: "Takings" as Due Process, or Due Process as "Takings"?*, 36 Val. U. L. Rev. 413, 418 (2002).

Of course, what's "wrong" with eliminating the doctrine of regulatory takings was spelled out by Justice Brennan in his dissent in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), the first opinion to employ the term, "regulatory taking." In that case, the California Supreme Court adopted the rule proposed by the passage above: a land-use regulation can *never* violate the Takings Clause, but at worst may be invalidated as a violation of due process. *See id.* at 621. As Justice Brennan pointed out, invalidation is hardly an adequate remedy for a plaintiff who (in that case) was deprived

of the use of its property for seven years. At least equally important, the unavailability of a regulatory taking claim encourages government agencies to promptly adopt new regulations whenever one is struck down on due process grounds, to maintain oppressive and unconstitutional restrictions indefinitely. Justice Brennan brought this point home by quoting extensively, in his *San Diego Gas* dissent, from a tract circulated by a California city attorney, light-heartedly urging his colleagues to do just that. *See id.* at 655-57.

A few of the staunchest regulatory partisans have directly repudiated Justice Brennan's reasoning, insisting that compensation under the Takings Clause should *never* be required for land-use regulations, no matter how draconian or basely motivated. *See, e.g.*, Norman Williams, et al., *The White River Junction Manifesto*, 9 Vt. L. Rev. 193, 193-97 (1984). More commonly, however, as in the case at bar, the imposition of regulatory takings liability is rejected on more abstract grounds: close judicial review of legislative or administrative actions is said to undermine the separation of powers, threaten the principle of democratic self-government, be contrary to the plain language of the Drafters, or signal a return to "Lochnerism." *See, e.g.*, Pet. Brf. at 39; Brf. for United States at 12-13. At this level of generality, however, these arguments run aground on the commonplace observation that the Constitution was *intended* to check majoritarian excesses, and interpreting the document's proper application to the other two branches of government has been an essential attribute of the judiciary since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *See also* Alexander M. Bickel, *The Least Dangerous Branch*, 1-14 (2d ed. 1986) (critiquing the argument for judicial review flowing from *Marbury*). As for the bogey of *Lochner*, no supra-textual normative charter is required for courts to administer the straightforward protections of property owners that animate the Fifth and Fourteenth Amendments. The proper

role of a court applying the substantial advancement test to takings claims has seldom been expressed more clearly than by Chief Judge Loren Smith of the Court of Federal Claims:

> In takings claims the judge does not sit as super legislator or executive, intent on preventing regulation that "goes too far," as a facile reading of Justice Holmes might imply. The job of the court is to deal with a concrete claim, by an aggrieved person or persons, that their Constitutional rights under the Fifth Amendment have been violated by some governmental action. The court must proceed to analyze this claim, as any other legal claim, regardless of the consequences to government policy.

Hage v. United States, 35 Fed. Cl. 147, 150-51 (1996).

In the final analysis, courts engaged in the proper application of the substantial advancement test are doing no more than performing their responsibility under our constitutional system of checks and balances. As the majority of this Court's Justices noted in *Eastern Enterprise*, the first requisite for the application of this standard is the existence of a discrete, constitutionally protected property interest. Once that threshold is met, the test resolves to a two-part inquiry: (1) Is the regulation designed to mitigate some public harm *that would otherwise be caused* by the unregulated use of the property in question? (2) Does the regulatory scheme single out some small group of property owners to bear a burden that should, in fairness and justice, be borne by the public as a whole? *See Armstrong v. United States*, 346 U.S. 40, 49 (1960). If the answer to the first inquiry is negative, or if the answer to the second inquiry is affirmative, the regulatory scheme in question fails to substantially advance legitimate state interests "***within the meaning of our regulatory takings doctrine***," *City of Monterey*, 526 U.S. at 721 (emphasis added), and thereby violates the Takings Clause.

CONCLUSION

For all the reasons set forth above, the opinion of the court below should be AFFIRMED.

DATED: December, 2004.

Respectfully submitted,

NANCIE G. MARZULLA
Of Counsel
Defenders of Property Rights
1350 Connecticut Avenue
Suite 410
Washington, DC 20036
Telephone: (202) 822-6760
Facsimile: (202) 822-6774

R.S. RADFORD
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amici Curiae